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No. 2618

IN THE

# United States Circuit Court of Appeals For the Ninth Circuit

K. V. KRUSE and R. BANKS, co-partners doing business under the firm name of Kruse & Banks Shipbuilding Company, on behalf of themselves and their underwriters,

*Appellants,*

vs.

M. J. SAVAGE, EDW. J. MORSER, JAMES H. HARDY, INC., JAMES H. HARDY, HANS MICHELSON, MRS. F. RULFS and DR. ALEXANDER WARNER, claimants of the American steamer "Hardy", her tackle, apparel and furniture,

*Appellees.*

## APPELLEES' REPLY TO APPELLANTS' PETITION FOR A REHEARING.

*Filed*

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W. S. ANDREWS,  
*Proctor for Appellees.*

*Filed this.....day of February, 1916.*

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*



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The appellants herein having filed and served upon us a petition for a rehearing in the above entitled matter, we are taking the liberty of replying thereto.

Appellants ask for a rehearing on the ground that their "case has not had full consideration and a vital point has been overlooked" (p. 5). This point, which appellants say this "court must have forgotten", is, that the "Hardy" was unseaworthy for not having sufficient fuel oil on board when she left Coos Bay for San Francisco. Appellants abandon their charge of negligence, that the "Hardy" should have searched for the barge longer than 11 hours, even though at 11:15 a. m. on September 7th there only remained 60 barrels of fuel oil on board (Pet. p. 4). They contend, however, that the decision of this court and of the lower court that the condition of the fuel supply justified the "Hardy" in discontinuing further search did not absolve it from the charge of negligence of not having started with sufficient supply of fuel oil, and of being unseaworthy in that particular.

It is difficult to follow appellants' reasoning and to understand their contention that the decision of this court, or of the lower court, "ignores the vital contention" that the "Hardy" was unseaworthy for lack of fuel oil. Obviously, the defense that the search was discontinued for lack of fuel oil would be untenable if in fact the "Hardy" was not properly supplied and did not have a reasonable amount of oil on board when she left Coos Bay. In finding that the "Hardy" was "not negligent in failing to keep up a longer search for the barge" the court necessarily was of the opinion that the "Hardy" was properly equipped in this regard

when she left Coos Bay. There is therefore no basis for the contention that a point to which counsel devoted six pages of their brief was forgotten or ignored.

As a matter of fact, the evidence establishes that the "Hardy" had a proper and reasonable supply of fuel oil on board. The chief engineer testified that he considered 130 to 140 barrels of oil to be an ample amount for the "Hardy" to carry in making the voyage from Coos Bay to San Francisco (Tr. p. 158), and though counsel for appellants would lay great stress on Captain Michelson's statement that he considered it prudent to carry between 260 to 280 barrels on each trip, he was clearly referring to the *round trip* from San Francisco to Coos Bay and return. The captain's estimate was just twice that of the engineer's, and they could not reasonably be so far apart in their estimates except on the basis that the captain was referring to a round trip. The "Hardy" uses 42 barrels of fuel oil every 24 hours or  $1\frac{3}{4}$  barrels every hour (Tr. p. 137). She had been making a regular run between Coos Bay and San Francisco week after week over a period of many months and in all that time the longest voyage between Coos Bay and San Francisco, made in very heavy wind and sea, had consumed only 72 hours (Tr. p. 137). Even on that hard voyage, therefore, 126 barrels of oil was sufficient. Yet the voyage involved in this action was made in 61 hours (Tr. p. 21) and if 11 hours had not been lost in searching for the barge it would

have been made in 50 hours. The "Hardy" must have had on board on this trip when she left Coos Bay at least 134 barrels of oil, or 8 more than was required on the slowest of any of her previous voyages. While there is no direct testimony that she had this amount of oil, the evidence demonstrates it to be the fact. At 11:15 a. m. on September 7th the "Hardy" had been at sea  $42\frac{1}{4}$  hours and though from 12:40 a. m. to 6 a. m. on September 7th she had been going northward at only half speed, still she had been bucking a northwest wind and sea and so consumed as much oil at half speed as if she had been running at full speed before the wind.

Up to 11:15 a. m. on September 7th the "Hardy", at the rate of 42 barrels per day, or  $1\frac{3}{4}$  barrels per hour, had used on that trip 74 barrels. It was at 11:15 a. m. on September 7th that the chief engineer, K. Knudson, sounded the tanks and found that there still remained about 60 barrels of fuel oil (Tr. pp. 137, 155). Hence the "Hardy" must have had on board when she left Coos Bay at least 134 barrels of fuel oil, which was, as stated before, 8 barrels more than had been required on the slowest and worst of her previous trips.

Nor can it be said that more oil should have been carried because of towing the barge, for appellants themselves testified that the barge was easy to tow (Tr. p. 68) and the engineer, whose testimony is cited with approval by appellants (App. Brief, pp.

16, 25), testified that the barge "didn't make any difference to the speed" of the ship (Tr. p. 154).

The "Hardy" made the entire trip in 61 hours, and 11 hours of that period were used in searching for the barge. The fact that the trip, which was a rough one, was made in 61 hours, that 11 hours of this time were consumed in searching, and that the "Hardy" still had 15 available barrels of oil left when she reached San Francisco (Tr. p. 156) proves conclusively that she was sufficiently well supplied with oil and cannot be called unseaworthy in this regard. The "Hardy" spent 11 hours searching and, as matters turned out, could have spent 8 hours more searching and yet have come safely to port. For she had 15 available barrels of oil left when she reached San Francisco (Tr. p. 156), and on that she could have run another 8 hours. When a ship is equipped with enough oil to run it 19 hours more than is required to make a *coastwise* trip under adverse conditions, it is difficult to see how she can be said to be unseaworthy for lack of oil. Appellants would have the "Hardy" unseaworthy if she did not have enough oil on board to continue this search until the barge was found, no matter how long it took. If the "Hardy" had known how near the barge she was at 11:15 a. m. she undoubtedly, as her previous efforts demonstrate, would have continued the search and found her. But she had already spent 11 hours searching the waters where the barge was likely to be found, without success. At 11:15 Captain Michelson was sure he was south

of the barge, as he actually was. Every mile north meant another mile on return. There was no certainty when or where the barge was, or but that it might already have run ashore. There still remained 145 miles to go, and to meet emergencies that might arise on the remainder of the trip the "Hardy" had about 15 available barrels of oil more than was actually used to complete the trip. Both the captain and the engineer considered that safety demanded that they keep this margin of oil untouched. It was the fact that there were still 145 miles to go (Tr. p. 56) and that emergencies might still arise, that made it necessary and prudent for the "Hardy" not to use up any more oil in searching, but to proceed for home.

The second and last ground advanced by appellants for granting a rehearing is set forth on page 6 of their petition in a *footnote!* It is contended that "the lack of enough fuel oil to take the 'Hardy' to San Francisco was not the proper criterion of her right" to discontinue searching for the barge while near Fort Bragg. This contention is absolutely unjustifiable and has no place in this court. There is not a word in the record to indicate that the "Hardy" could have gotten into the port of Fort Bragg or could safely have moored there. Fort Bragg is not a "safe port", as counsel says, but is an outside port subject to the peril of wind and sea at all times, and only steamers equipped with heavy lines and auxiliary anchors and chains can safely anchor there. There is nothing in the

record to show that the "Hardy" had such an equipment, as in fact she had not, for she cleared only between San Francisco and Coos Bay, and no extraordinary equipment is required by the Federal Inspectors unless the clearance is for outside ports. There is not a shred of evidence to show that fuel oil was obtainable at Fort Bragg, or if obtainable, that it could have been secured before the barge went ashore. In fact, the record is absolutely silent on the question of the possibility of the "Hardy" going to Fort Bragg, and of course any statement by counsel on the subject is improper.

The evidence, then, clearly establishes that the "Hardy" was amply supplied with fuel oil when it left Coos Bay and was not unseaworthy. That appellant's contention in this particular, though in our opinion without merit, was not "forgotten" or "ignored" by this court is clearly shown by the finding that the "Hardy" was not negligent in failing to pursue its search. For abandonment on the ground of lack of oil would be no excuse if the "Hardy" was not reasonably supplied with oil when she left Coos Bay.

Dated, San Francisco,

February 17, 1916.

Respectfully submitted,

W. S. ANDREWS,

*Proctor for Appellees.*

